Zulsafari bin Ab Ghani & Anor v Shahril bin Idris

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12–40 OF 2001
SU GEOK YIAM JC
6 FEBRUARY 2002

Road Traffic *— Negligence — Road accident — Collision between plaintiff's motor cycle and defendant's motorcar — motorcar was parked at emergency lane — Plaintiff fell off and hit by oncoming motorvan — Whether defendant should have parked motorcar further inside the emergency lane or placed warning sign behind the motorcar — Whether defendant and plaintiff were equally liable — Whether trial judge drew proper inferences from proven facts*

Tort *— Negligence — Contributory negligence — Collision between plaintiff's motor cycle and defendant's motorcar — motorcar was parked at emergency lane — Plaintiff fell off and hit by oncoming motorvan — Whether defendant should have parked motorcar further inside the emergency lane or placed warning sign behind the motorcar — Whether trial judge should have held that plaintiff and defendant were equally liable*

A collision occurred between a motor cycle ridden by the plaintiff and the second defendant's motorcar. The motorcar had broken down and was left stationary by the second defendant along the emergency lane of the highway while he went to seek assistance. As a result of the collision, the plaintiff fell onto the highway and was hit by an oncoming motorvan. The plaintiff sustained serious injuries and was paralysed as a result. The trial judge found the second defendant and the plaintiff equally liable for the accident and apportioned liability between them at 50% each. The second defendant appealed.

Held, allowing the second defendant's appeal on the issue of liability:

(1) The trial judge had not considered that the driver of the motorvan ('SD2') was the first person to lodge the police report and in his police report, he mentioned that the motorcar was in the emergency lane. The second report was lodged by the second defendant and in it, he mentioned that his motorcar had problems and he had parked it at the emergency lane with both the signal lights and rear lights on. On the other hand, the plaintiff lodged his police report some seven months after the accident and according to the report, half the motorcar was parked on the emergency lane and the other half on the slow lane. The trial judge did not consider that since the second defendant and SD2 had lodged their reports at the earliest available opportunity, their police reports were more likely to be true as opposed to the plaintiff's report (see pp 452H–453C).

(2) In his oral testimony, the plaintiff stated that he was following closely behind the middle of the motor lorry and the lights of his motorcycle were turned on. The trial judge did not consider that the plaintiff failed to give the registration number of the motor

lorry in his police report. If the trial judge had correctly directed himself on the evidence adduced before him, he would have concluded that it was most probable that the plaintiff was riding his motorcycle either on the white line demarcating the start of the emergency lane or within the emergency lane, something which he should not have done (see pp 453C–D, 454F–G).

(3) Even if it were true that the plaintiff followed closely behind the middle of the motor lorry, the trial judge erred when he failed to consider that if the plaintiff had kept a safe distance from the motor lorry and kept a proper lookout, the plaintiff could have avoided colliding into the motorcar since there was ample evidence that the lights of the motorcar were switched on. Had the trial judge considered this factor, he would have held in favour of the second defendant (see p 456C–E).

(4) The second defendant had called the adjustor ('SD4') to testify that he had been instructed to interview the tow truck operators. Despite efforts made, SD4 stated that he had been unable to locate the tow truck operators as the tow truck company had closed down due to the economic downturn. As such, the trial judge erred when he drew an adverse inference against the second defendant for failing to call the tow truck operator. If the trial judge had considered SD4's evidence on this issue, he would have been satisfied that sufficient attempts had been made to locate the tow truck operators and would not have drawn an adverse inference against the second defendant (see pp 456H–457A, D–E).

(5) Since it was reasonably foreseeable that motorcyclists may use the emergency lane or ride on the white line, the second defendant should have parked the motorcar further inside the emergency lane as the whole width of the emergency lane was about ten feet wide whereas the standard car width was about six feet. Alternatively, the second defendant should have placed a warning sign behind the motorcar to alert the motor cyclists (see p 459A–B).

(6) The trial judge had erred when he did not draw the proper inferences from the proven facts. If the trial judge had not made that error, he would have held that the evidence of the plaintiff was inherently improbable and the second defendant's version more inherently probable. Having done so, the trial judge would then have gone on to consider whether the second defendant had contributed to the accident by parking his car too close to the white line demarcating the start of the emergency lane and the end of the slow lane without placing a warning sign at a reasonable distance behind the motorcar. If the trial judge had done so, he would have concluded that the second defendant should have parked the car further inside the emergency lane or should have placed a warning sign behind the motorcar. For this act of

contributory negligence, the trial judge should have held that the second defendant was 25% liable to the plaintiff (see p 460D–G). A

(7) Hence, the order of the trial judge on apportionment of equal liability between the plaintiff and the second defendant was unjustified and accordingly, set aside. Liability was apportioned between the plaintiff and the second defendant at 75% and 25% respectively (see p 460H–I). B

[Bahasa Malaysia summary

Satu pelanggaran telah berlaku antara sebuah motosikal yang ditunggang oleh plaintif dan kereta defendan kedua. Kereta tersebut telah rosak dan diletakkan tanpa bergerak oleh defendan kedua di lorong kecemasan lebuh raya sementara beliau pergi untuk mendapatkan bantuan. Akibat kemalangan tersebut, plaintif telah jatuh di atas lebuh raya tersebut dan dilanggar pula oleh sebuah van yang lalu di situ. Plaintif telah mengalami kecederaan serius dan akibat darinya telah lumpuh. Hakim perbicaraan telah memutuskan defendan kedua dan plaintif sama-sama bertanggungan bagi kemalangan tersebut dan membahagikan tanggungan antara mereka pada kadar 50% setiap satu dari mereka. Defendan kedua telah merayu. C D E

Diputuskan, membenarkan rayuan defendan kedua atas isu tanggungan:

(1) Hakim perbicaraan telah tidak mempertimbangkan bahawa pemandu van tersebut ('SD2') merupakan orang pertama yang telah membuat laporan polis, beliau menyebut bahawa kereta tersebut berada dalam lorong kecemasan. Laporan kedua telah dibuat oleh defendan kedua dan di dalam laporannya, beliau menyebut bahawa keretanya mempunyai masalah dan beliau telah meletaknya di lorong kecemasan dengan kedua-dua lampu isyarat dan lampu belakang menyala. Sebaliknya, plaintif telah membuat laporan polisnya lebih kurang tujuh bulan selepas kemalangan tersebut dan menurut laporan tersebut, sebahagian kereta tersebut telah diletakkan dalam lorong kecemasan dan sebahagian lagi di lorong perlahan. Hakim perbicaraan tidak mempertimbangkan bahawa oleh kerana defendan kedua dan SD2 telah membuat laporan-laporan mereka secepat yang mereka berkemungkinan dapat lakukan, laporan-laporan polis mereka adalah berkemungkinan besar benar bertentangan dengan laporan yang dibuat oleh plaintif (lihat ms 452H–453C). F G H

(2) Dalam testimoni lisannya, plaintif menyatakan bahawa beliau telah diikuti dengan dekatnya di belakang tengah lori tersebut dan lampu motosikalnya dinyalakan. Hakim perbicaraan tidak mempertimbangkan bahawa plaintif telah gagal memberikan nombor pendaftaran lori tersebut di dalam laporan polis beliau. I

Jika hakim perbicaraan telah mengarahkan dirinya dengan betul atas keterangan yang dikemukakan di hadapan beliau, beliau tentunya telah memutuskan bahawa ianya adalah amat berkemungkinan bahawa plaintif sedang menunggang motosikal beliau sama ada di atas garisan putih yang menandakan permulaan lorong kecemasan atau di dalam lorong kecemasan, sesuatu yang beliau tidak seharusnya lakukan (lihat ms 453C–D, 454F–G).

(3) Meskipun jika ianya benar bahawa plaintif telah menyusuli dekat di belakang bahagian tengah lori tersebut, hakim perbicaraan telah tersalah pertimbangan apabila beliau gagal untuk menimbangkan bahawa jika plaintif telah berada pada jarak yang selamat dari lori tersebut dan berjaga-jaga, plaintif tentunya dapat elak dari melanggar kereta tersebut kerana terdapat keterangan yang mencukupi bahawa lampu kereta tersebut telah dinyalakan. Sekiranya hakim perbicaraan telah mempertimbangkan faktor ini, beliau tentunya telah memberi keputusan yang memihak kepada defendan kedua (lihat ms 456C–E).

(4) Defendan kedua telah memanggil penyelaras ('SD4') untuk memberi keterangan bahawa beliau telah diarah untuk menemu duga operator-operator trak tunda. Meskipun usaha-usaha telah dibuat, SD4 menyatakan bahawa beliau telah tidak dapat mengesan operator-operator trak tunda tersebut kerana syarikat trak tunda tersebut telah pun ditutup kerana kemelesetan ekonomi. Oleh yang demikian, hakim perbicaraan telah tersalah pertimbangan apabila beliau membuat inferens yang menentang terhadap defendan kedua kerana gagal memanggil operator trak tunda. Jika hakim perbicaraan telah mempertimbangkan keterangan SD4 atas isu ini, beliau tentunya berpuas hati bahawa percubaan yang memadai telah dilakukan untuk mengesan operator-operator trak tunda tersebut dan tidak akan membuat inferens yang menentang terhadap defendan kedua (lihat ms 456H–457A, D–E).

(5) Oleh kerana adalah dengan wajarnya dapat diramalkan bahawa penunggang-penunggang motosikal mungkin menggunakan lorong kecemasan atau menunggang di atas garisan putih, maka defendan kedua sepatutnya telah meletakkan kereta tersebut lebih jauh ke dalam lorong kecemasan tersebut kerana seluruh keluasan lorong kecemasan tersebut adalah lebih kurang sepuluh kaki lebar sedangkan lebar standard kereta adalah lebih kurang enam kaki. Secara alternatifnya, defendan kedua sepatutnya meletakkan satu tanda amaran di belakang kereta tersebut untuk memberi amaran pada penunggang-penunggang motosikal (lihat ms 459A–B).

(6) Hakim perbicaraan telah tersalah pertimbangan apabila beliau tidak membuat inferens yang sempurna daripada fakta-fakta yang terbukti. Jika hakim perbicaraan tidak membuat kesilapan itu,

beliau tentunya telah memutuskan bahawa keterangan plaintif adalah sesungguhnya tidak berkemungkinan berlaku dan versi defendan kedua adalah lebih berkemungkinan. Setelah melakukan sedemikian, hakim perbicaraan tentunya pula menimbangkan sama ada defendan kedua telah menyumbang kepada kemalangan tersebut dengan meletakkan kereta beliau terlalu dekat dengan garisan putih yang menandakan permulaan lorong kecemasan dan tamatnya lorong perlahan tanpa meletakkan tanda amaran pada satu jarak yang berpatutan di belakang kereta tersebut. Jika hakim perbicaraan telah melakukan sedemikian, beliau tentukan telah memutuskan bahawa defendan kedua sepatutnya telah meletakkan kereta tersebut lebih jauh ke dalam lorong kecemasan atau sepatutnya telah meletakkan tanda amaran di belakang kereta tersebut. Bagi tindakan kecuaian sertaan ini, hakim perbicaraan sepatutnya telah memutuskan bahawa defendan kedua adalah bertanggungan sebanyak 25% kepada plaintif (lihat ms 460D–G).

(7) Oleh demikian, perintah hakim perbicaraan atas pembahagian tanggungan yang seimbang antara plaintif dan defendan kedua adalah tidak wajar dan sehubungan itu, diketepikan. Tanggungan telah dibahagikan antara plaintif dan defendan kedua pada kadar 75% dan 25% masing-masingnya (lihat ms 460H–I).]

Notes

For cases on road accident, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 391–420.

For cases on contributory negligence, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 628–668.

Cases referred to

Abdul Mokhti bin Haji Ahmad v Idris bin Ibrahim [1977] 2 MLJ 85 (distd)

Ahmad Nordin bin Haji Maslan & Anor v Eng Ngak Hus & Ors [1985] 2 MLJ 431 (refd)

Chan Loo Kee v Lai Siew San & Ors [1971] 1 MLJ 253 (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517 (refd)

Chop Seng Heng v Thevannasan & Ors [1975] 2 MLJ 3 (refd)

De Cotta v Tan Hock Lee [1972] 2 MLJ 173 (distd)

London Passenger Transport Board v Upson [1949] AC 155 (refd)

Mohd Salleh bin Samad v Zainodin bin Dongking [2001] MLJU 623 (refd)

Parkinson v Liverpool Corp [1950] 1 All ER 367 (distd)

Samar binte Mansor v Mustafa Kamarul Ariffin [1974] 2 MLJ 71 (refd)

Siow Choo Foo v Lee Peng Lay & Anor [1981] 2 MLJ 336 (distd)

A *Zainap bte Abd Majid & Ors v Gan Eng Hwa & Ors* [1995] 1 MLJ 801 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

B

Appeal from: Summons No 53–141 of 1999 (Sessions Court, Teluk Intan)

Gurmit Singh (*Gurmit & Co*) for the appellant/defendant.
Sarjeet Singh Sandhu (*Sandu & Assoc*) for the respondent/plaintiff.

C **Su Geok Yiam JC**: This is an appeal against the decision of the learned Sessions Court Judge, Teluk Intan in a running down case.

The undisputed facts

D The undisputed facts are briefly as follows:

> On 19 October 1998, a collision occurred between a motorcycle bearing registration no ACD 7929, ridden by the plaintiff and a motorcar bearing registration no MAJ 4798, belonging to the first defendant and driven by the second defendant (hereinafter referred to as 'the first collision'). At the time of the first collision, the motorcar had been left stationary by the second
E defendant along the left side of the North South highway at the 323.3km in the district of Tapah as one faces southwards.

After colliding into the motorcar the plaintiff fell onto the highway. Soon after this a motorvan, bearing registration no BEW 9884, owned by the third defendant and driven by the fourth defendant, came along and collided into the plaintiff from the rear ('the second collision').
F

All three vehicles were travelling in the same direction, ie towards Kuala Lumpur. The plaintiff, the second defendant and the fourth defendant lodged police reports, viz Tapah Report Nos 924/99, 1764/98 and 1763/98, respectively.

G The accident caused the three vehicles to be damaged as follows (in the use the words of the investigating officer):

(a) The motorcycle

i Lampu besar depan pecah.
ii Penghadang angin depan kiri pecah.
H iii Handle bengkok.
iv No plet depan patah.
v Lampu isyarat kiri kanan depan pecah.

(b) The motorcar

I i Lampu belakang besar kanan pecah.
ii Dinding di bahagian bucu sebelah kanan kemek.
iii Lampu isyarat belakang kanan pecah.

(c) The motorvan

i No plet depan retak.

ii Kesan-kesan kaca di bahagian depan.

As a result of the two collisions 'the said accident'), the plaintiff suffered the following injuries:

(a) compound Grade III A fracture of the left femur;

(b) 4cm lacerated wound over the left thigh;

(c) close fractures of the left tibia and fibula;

(d) compound fracture dislocation of the right ankle;

(e) compound fracture dislocation of the right ring finger at the distal inter phalangeal joint;

(f) compression fracture of lumbar 1 and lumbar 2 vertebrae with complete paraplegia; and

(g) right lung contusion and haemathorax.

He also suffered from the following disabilities:

(a) He has complete paraplegia below the lumbar 1 and lumbar 2 levels with total loss of bladder and bowel control and no sensation or motor power in the lower limbs. This is permanent.

(b) The lower limbs are wasted and have uncontrolled spastic contractions and contractures of the knee and ankles. The right ankle is deformed and has a fixed flexion deformity. This is permanent.

(c) He cannot straighten his back to sit comfortably on the wheel chair or chair because of the kyphotic deformity of the thoraco lumber spine. This is permanent.

(d) The right ring finger is deformed and medially deviated. He has difficulty in forming a full fist with the right hand. This is permanent. However, there is a possibility of recovery of his right hand. Although he cannot use his right hand with full force he can perform light duty in future as an operator.

As a result of his injuries and disabilities the plaintiff:

(a) ambulates in a wheel chair and needs help to get in and out of the wheel chair and the bed;

(b) needs to change the catheter every three weeks;

(c) needs an assistant to help him with his toilet needs, to bathe him and to transport him in and out of the wheel chair or bed;

(d) needs pampers to collect his stool;

(e) needs surgery to remove the nail in his left femur and plate in his left tibia (this will cost RM4,000); and

(f) needs regular medical reviews as he is prone to suffer from urinary tract infections and bedsores.

A The plaintiff sued the four defendants in the Sessions Court, Teluk Intan seeking damages for his injuries, disabilities, pain and suffering and loss. He alleged, inter alia, that the accident was caused solely or contributed to substantially by the negligence of the second and fourth defendants.

B *The plaintiff's amended statement of claim*

In para 6 of his amended statement of claim, the plaintiff has pleaded specifically as follows:

> Apabila plaintiff sampai berdekatan di KM 323.3 Lebuh Raya Utara/Selatan (di kawasan Tapah), plaintiff telah berlanggar dengan sebuah motokar No MAJ 4798 yang terletak dan terbiar dengan posisi separuh badan kereta di
C atas lorong kecemasan dan separuh lagi di lorong perlahan Lebuh Raya tersebut dan tanpa sebarang tanda isyarat amaran oleh defendan kedua pada ketika itu.

The plaintiff has also set out the following particulars of the negligence of the second defendant:

D (a) ...

(b) Menghalangi laluan sah plaintif secara salah;

(c) Gagal untuk menjaga keselamatan penguna-penguna jalanraya yang lain terutama terhadap plaintif pada masa ketika itu;

(d) Gagal untuk memberi sebarang lampu isyarat ataupun tanda isyarat
E amaran yang mencukupi dan jelas di bahagian belakang motorcar MAJ 4798;

(e) Meletak dan membiarkan motokar No MAJ 4798 dengan separuh badan kereta di atas garisan sempadan lorong kecemasan dan separuh lagi di atas lorong perlahan lebuhraya tersebut tanpa memastikan bahawa ia adalah selamat pada masa ketika itu;

F (f) ...

(g) Gagal untuk mengambil langkah-langkah waspada, berjaga-jaga dan pengawalan yang patut dan munasabah sebagai pengguna jalanraya untuk mengelak perlanggaran ini akibat dari suasana merbahaya dan cemas yang ditimbulkan pada masa ketika itu;

(h) Gagal mematuhi kod dan Akta Jalanraya.

G It is apparent from the above that the plaintiff's case is that the second defendant is wholly or contributorily negligent by creating a dangerous situation, viz by causing the motorcar to obstruct the plaintiff's right of way on the slow lane of the highway because the second defendant had parked the motorcar in such a way that half of the motorcar was on the slow lane
H and the other half was on the emergency lane without placing any warning sign behind the motorcar or switching on the hazard lights.

In respect of the fourth defendant, the plaintiff has pleaded the following particulars of the negligence of the fourth defendant in his amended statement of claim:

I (a) Memandu motovan No BEW 9884 di dalam keadaan terlaju;

(b) Gagal untuk memberi perhatian yang cukup dan jelas kepada plaintif pada masa ketika itu;

(c) Melanggar plaintif dari belakang secara salah;

(d) Gagal untuk menjaga keselamatan penguna-penguna jalanraya yang lain terutama terhadap plaintif pada masa ketika itu;

(e) Gagal untuk mengendalikan motovan No BEW 9884 dengan kebijaksanaan di dalam apa jua keadaan;

(f) Gagal untuk berhenti, memperlahankan, mengelak ataupun mengawal dan mengendalikan motovan No BEW 9884 dengan cara-cara yang lain untuk mengelakkan perlanggaran ini;

(g) Gagal mematuhi kod dan Akta Jalanraya.

However, Mr Sarjeet Singh, the plaintiff's learned counsel, informed this court that since the plaintiff's statement of claim was not served on the fourth defendant, the plaintiff had withdrawn its claim against the fourth defendant and the plaintiff's claim against the fourth defendant was subsequently struck out. In the light of that, I have not dealt with the plaintiff's case against the fourth defendant nor the defence of the fourth defendant nor the liability or otherwise of the fourth defendant in this appeal. For the purposes of this appeal, the fourth defendant's role is that of a witness, that is, SD2.

The first and second defendants' statement of defence

The first and second defendants have pleaded as follows in para 6 of their statement of defence filed on 16 November 1999 at p 20 of the appeal record:

6 Defendan pertama dan kedua menyatakan perlanggaran itu telah diakibatkan secara keseluruhannya dan/atau disumbangkan oleh kecuaian penunggang motosikal No ACD 7929 apabila melanggar motokar defendan kedua yang rosak dari belakang kanan dan yang diletak dalam lorong kecemasan dengan lampu serta isyarat kecemasan dipasang.

They have also set out the following particulars of the plaintiff's negligence:

(a) Gagal memberi sebarang perhatian yang secukupnya kepada kehadiran motokar defendan kedua yang diletak dalam lorong kecemasan dengan lampu dan isyarat kecemasan dipasang;

(b) Gagal berhati-hati dan/atau mengurangkan lajunya apabila melihat kehadiran motokar defendan kedua yang rosak dalam lorong kecemasan dengan lampu dan isyarat kecemasan dipasang;

(c) ...

(d) ...

(e) Gagal mengambil apa-apa pertimbangan yang memadai untuk keselamatan diri sendiri semasa menunggang motosikalnya di jalan tersebut;

(f) Menunggang motosikalnya dengan laju sehingga tidak dapat mengawal motosikalnya dengan baik;

(g) ...

(h) Gagal melihat dan/atau mengawasi motokar defendan kedua dalam masa yang mencukupi memandangkan jalan tersebut adalah lurus serta

A lampu dan isyarat kecemasan dipasang untuk mengelak perlanggaran tersebut;

(i) Gagal memberhenti, memperlahankan dan/atau mengawal dengan baik dalam apa cara lain untuk mengendalikan atau mengawal motosikalnya untuk mengelak perlanggaran tersebut;

B (j) Menunggang motosikal dengan sikap cuai dan bahaya sehingga perlanggaran berlaku dengan motokar defendan kedua;

(k) ...

(l) ...

(m) ...

C (n) ...

(o) Menunggang motosikal di sebelah jalan yang salah dan/atau di lorong kecemasan dan melanggar motokar defendan kedua;

(p) ...

(q) ...

D (r) Mengikut kenderaan lain dengan jarak yang dekat dan tidak selamat dan melanggar motokar defendan kedua;

(s) Gagal memasang lampu atau memasang lampu yang tidak terang dan tidak mencukupi untuk melihat motokar defendan kedua;

E From the relevant portions of the statement of defence of the first and second defendants as set out above, it is apparent that the defendant's case is that the plaintiff had collided into the rear right corner of the motorcar while it was parked on the emergency lane with both its lights and hazard lights switched on and in so doing, the plaintiff was wholly negligent or contributorily negligent because the plaintiff did not keep a proper look-out, was speeding, was riding on the wrong part of the road and/or the F emergency lane, was following too closely behind another vehicle and either did not switch on his lights or had switched on his lights but his lights were not bright enough to enable the plaintiff to see the motorcar.

The decision of the learned trial judge

G The trial in the court below went on for several days. Upon the conclusion of the trial, the learned Sessions Court Judge, Teluk Intan, on 23 February 2001, found both the second defendant and the plaintiff equally liable for the accident and apportioned liability between them at 50% each.

Based on 100% liability he awarded to the plaintiff the following:

H (1) a sum of RM190,800 as general damages for injuries suffered by the plaintiff with interest at 8%pa from the date of service of the summons to the date of judgment;

(2) a sum of RM38,400 as special damages for loss of earnings with interest at 4%pa from the date of accident to the date of judgment;

I (3) a sum of RM20 being special damages for the cost of police documents with interest at 4%pa from the date of accident to the date of judgment;

(4) a sum of RM120 being special damages for the cost of medical reports with interest at 4%pa from the date of accident to the date of judgment;

(5) a sum of RM1,400 being special damages for the cost of purchasing a wheel chair with interest at 4%pa from the date of accident to the date of judgment;

(6) a sum of RM2,000 being special damages for the cost of removing the metal plate and screw from the plaintiff's leg with interest at 4%pa from the date of accident to the date of judgment;

(7) a sum of RM660 being special damages for the cost of the specialist orthopaedic report with interest at 4%pa from the date of accident to the date of judgment;

(8) a sum of RM20,160 being special damages for the cost of purchasing pampers with interest at the rate of 4%pa from the date of accident to the date of judgment;

(9) a sum of RM325 being special damages for traveling expenses with interest at 4%pa from the date of accident to the date of judgment;

(10) a sum of RM14,000 being special damages for the pre-trial cost of nursing care; and

(11) a sum of RM80,931 being special damages for the post-trial cost of nursing care.

All the above awards except items (10) and (11) carried interest at 8%pa from the date of judgment to the date of settlement.

The learned trial judge also awarded costs of the action to the plaintiff.

The first and second defendants' appeal

On 7 March 2001, the first and second defendants, being dissatisfied with the decision of the learned trial judge both on liability and quantum, filed their notice of appeal.

In their memorandum of appeal filed on 25 May 2001, the first and second defendants, who are the appellants in this appeal, have set out 17 grounds in support of their appeal.

However, when their appeal came up for hearing before this court on 4 December 2001, Mr Gurmit Singh, the learned counsel for the appellants, informed the court that they were proceeding only on the following five issues:

(1) whether there was a failure on the part of the learned trial judge to consider all the evidence adduced during the trial (paras 1 and 4 of the memorandum of appeal);

(2) whether there was a failure on the part of the learned trial judge to consider the ability of the plaintiff who is the respondent in this appeal to avoid colliding into the first defendant's motorcar had he followed the motor lorry at a safe distance (para 9 of the memorandum of appeal);

(3) whether the learned trial judge had erred when he placed on the second defendant an extremely high standard of care (paras 10, 11, 15 and 16 of the memorandum of appeal);

(4) whether the learned trial judge had erred when he drew an adverse inference under s 114(g) of the Evidence Act 1950 against the defendants for failing to call the tow truck operators to testify on the defendants' behalf (para 14 of the memorandum of appeal); and

(5) whether the learned trial judge had erred when he held that the plaintiff and the second defendant were equally liable for the accident (para 2 of the memorandum of appeal).

The court shall now consider each of the five issues in the light of the oral submissions of both the learned counsels, the appeal record, the grounds of judgment of the learned trial judge, the principles of law applicable and the decided cases relied upon by the learned counsels.

Issue 1: Whether there was a failure to consider all the evidence adduced

Having subjected the learned trial judge's grounds of judgment and the notes of evidence to a close scrutiny this court found as follows:

(1) The learned trial judge had accepted *in toto* the plaintiff's version as to how the accident occurred without assigning any reason thereunto. According to the plaintiff, just before the first collision, he was riding behind a small motor lorry along the North-South Highway going towards the direction of Kuala Lumpur. At the 323.3km the motor lorry suddenly turned right into the fast lane. When this happened he was shocked by the sight before him of a motorcar which was parked with half of it on the emergency lane and the other half on the slow lane without any warning sign. He attempted to avoid colliding into the motorcar but was unable to do so because the distance between him and the motorcar was too short.

(2) Unfortunately, other than setting out the damage to the plaintiff's motorcycle and the first defendant's motorcar and noting that the scene of the accident was a straight stretch of road as shown in the sketch plan (P1) and there were glass splinters at 'C' in the sketch plan (P1) and photograph (P2E), ie at the sides of the slow lane and the emergency lane and a spot of oil at 'B' in P1 and in P2E, and stating that after scrutinising the evidence he found on the balance of probabilities, the plaintiff's version more probable, the learned trial judge did not explain why he was of that view.

(3) Neither did the trial judge, having accepted the plaintiff's version as being more probable, proceed to hold the second defendant wholly liable for the accident.

(4) Instead, he apportioned liability equally between the plaintiff and the second defendant at 50%/50% on the following grounds:

(a) that the accident had occurred at night at about 8–8.30pm;

(b) that the scene of the accident was dark at the material time;

(c) that the second defendant did not park the motorcar wholly within the emergency lane based on the presence of glass splinters on the left side of the slow lane and on the right side of the emergency lane as one faces southwards;

(d) the second defendant did not place any sign to warn other vehicles that he had parked the motorcar there; and

(e) he drew an adverse inference against the second defendant for not calling the tow truck operators, whom the second defendant had alleged had stopped in front of the motorcar, to testify as to the truth of the second defendant's assertion that he had parked his car wholly within the emergency lane.

Before me, Mr Gurmit Singh, the learned counsel for the second defendant, submitted that the learned trial judge had failed to take into account the presence of tyre marks in the emergency lane. He was of the view that had the learned trial judge considered this factor in addition to the presence in the emergency lane near to the grass verge of the spot of oil at 'B' in the sketch plan, P1, he would have arrived at a different conclusion because these two factors together supported the second defendant's version that he had left the motorcar parked wholly within the emergency lane and not with half of the motorcar on the emergency lane and the other half on the slow lane as alleged by the plaintiff.

Mr Gurmit Singh further submitted that the plaintiff had on p 56 of the appeal record admitted that he had followed too closely behind the motor lorry and that if he had kept at a safe distance he could have avoided colliding into the motorcar. However, there is nothing in the grounds of judgment of the learned trial judge to show that he had considered this piece of evidence when he ruled that the plaintiff's version was more probable.

In response, Mr Sarjeet Singh, the learned counsel for the second defendant, conceded that although the investigating officer had given evidence that the tyre marks found in the emergency lane were believed to be those of the motorcar, he had not taken any measurements to confirm this.

In his submissions in reply, Mr Gurmit Singh added that at p 51 of the appeal record, there was evidence from the investigating officer that he had found oil stains on the tyre of the motorcar.

The plaintiff's evidence

The court shall now deal with the evidence of the plaintiff.

The plaintiff had testified, inter alia, as follows:

On 19 October 1998, he was involved in a road accident at the 323.3km along the North-South Highway. He was riding alone on his motorcycle, heading south, towards Kuala Lumpur from Kuala Kangsar. He was traveling at a speed of 80kmph. He was following right behind a small empty motor lorry along the slow lane at a distance of nine feet. At that point of time, it was not raining but it was dark and cold. Some parts of the

road were wet and there were also puddles of water on the road. Suddenly, the motor lorry turned right into the fast lane. When this happened he was shocked because he saw before him a motorcar which was parked half on the emergency lane and the other half on the slow lane without any warning signs. He attempted to avoid colliding into the motorcar by swerving to his right. Unfortunately, he was unable to do so because the distance between his motorcycle and the motorcar was only 16ft and the motorcar which had no lights was in his right of way. The left handle bar of his motorcycle collided into the rear right lamp of the motorcar and the plaintiff fell onto the road in the slow lane. Soon after this another vehicle collided into him from behind. He felt pain in his back and thereafter he lost consciousness. When he recovered consciousness he found himself in an ambulance which was taking him to the Tapah district hospital.

In his police report, P3, he had given the time of the accident as about 8pm.

In cross-examination he agreed as follows:

He was following too closely behind the motor lorry. It is against the law to ride a motorcycle in the emergency lane irrespective of whether it is daytime or night-time. It is also against the law to ride a motorcycle on the white line separating the emergency lane and the slow lane. He did not see the motorvan following him from behind because he did not look into the rear mirror of his motorcycle although his motorcycle had a rear mirror.

However, he disagreed as follows:

He did not switch on his front and rear lights. He had been advised to lodge P3 in the way it was drafted.

This court notes that the manner in which the first and second collisions had taken place as was stated by the plaintiff in his oral evidence in the court below is similar and consistent with that contained in his police report, P3, at p 105 of the appeal record.

The investigating officer's evidence

The court shall now next deal with the evidence of the only independent witness, namely, the investigating officer ('IO'), who testified for the plaintiff.

The IO, Sergeant 68739 Ameruddin bin Hamzah, SP 1, had testified, inter alia, as follows:

The accident occurred at about 7.30pm. He received the first information report at 8.20pm. He arrived at the scene of the accident at 8.51pm. He found spillage of oil in the emergency lane at the spot marked 'B' in his sketch plan, P1. He believed it came from the motorcar. He agreed at p 50 of the appeal record that there were tyre marks in the emergency lane as shown in the photograph, ID2E. He believed the tyre marks came from the motorcar because upon his examination of the tyre of the motorcar, he found traces of oil on the tyre. He agreed that he did not record the presence of the tyre marks in the emergency lane in his sketch plan, P1.

The second defendant's evidence

The court shall now deal with the evidence of the second defendant.

The second defendant had testified as follows:

On 19 October 1998 at about 5pm, he was driving the motorcar together with his wife from Taiping towards Kuala Lumpur. At about 6 or 6.30pm, on reaching the 323.3km along the North-South Highway which was a straight stretch of road, smoke came out from behind the motorcar. He stopped the motorcar in the emergency lane as he was of the opinion that in the circumstances that was the safest place for him to do so. He switched on both the lights and the hazard lights. He then inspected the engine and found that it was not functioning. Before he could call for assistance from PLUS, a private tow truck operator suddenly appeared in front of the motorcar and offered to tow the motorcar to a workshop. He asked the tow truck operator to place cones behind the motorcar but was told that it was not necessary as the tow truck operator wanted to tow the motorcar rightaway to the workshop. Upon the tow truck operator's assurance, the second defendant and his wife got into the car of the tow truck operator's friend which was parked across the highway in the direction of Ipoh. As he left the place where the motorcar was parked he could still see the hazard lights flashing. At that time, it was not raining and the road was dry. Although it was twilight time it had not turned dark yet.

However, the car in which he was in had to make a U-turn at Gopeng in order to get to the workshop. As he reached the place where he had left his motorcar, he saw that there was a traffic jam and the rear right lamp of his car including the signal light was broken. The PLUS patrol personnel were controlling the traffic flow along the highway. He asked the tow truck operator what happened and was told that a motorcycle had collided into the rear right of his motorcar and that the motorcyclist who had fallen down onto the road was subsequently collided into by a motorvan.

On the orders of the PLUS patrol personnel, he had the motorcar towed to the Tapah police station by the tow truck operator. While his motorcar was being towed away, the traffic police arrived at the scene of the accident. He then went to the Tapah police station and lodged his report, D10.

In cross-examination he had agreed as follows:

In his police report, he had said that the motorcar had broken down at 7.30pm. He had spent 15min inspecting the motorcar and thinking about the next course of action to take. After that, he spent another half an hour talking to the tow truck operator and the latter's friend. The accident occurred at about 8.15–8.30pm. It was already dark at the scene of the accident. No warning sign was placed behind the motorcar. He could have moved the motorcar onto the grass verge in the emergency lane with the help of the three tow truck operators. He could have prevented the accident from happening if that had been done. If a cone had been placed behind the motorcar the plaintiff could have seen the cone and avoided the first collision.

He, however, maintained that he had switched on his hazard lights and that the motorcar was not obstructing the traffic. He disagreed that the accident arose as a result of his negligence in not placing a cone behind the motorcar and in not parking the motorcar on the grass verge in the emergency lane.

In re-examination, the second defendant had clarified as follows:

He did not park his car on the grass verge because he had exercised his right to park his car in the emergency lane when his car developed engine trouble. He had inspected the engine and saw oil dripping onto the road surface. With regard to his failure to place a cone behind his car, he explained that if the plaintiff could not see the lights of the car there is a possibility that the plaintiff would have collided into the cone even if he had placed a cone behind his car. Notwithstanding that as he did not carry a cone in the motorcar, he was unable to place a cone behind the motorcar. He was also not sure whether the tow truck operator had a cone.

In support of his case, the second defendant called three witnesses, namely, his wife, Pn Noor Hafizah bte Zakaria ('SD3') the driver of the motorvan, Mr Zaidi bin Alias ('SD2') and an adjuster, Mr Francis a/l Stephen ('SD4').

The motorvan driver's evidence

The court shall now deal with the evidence of SD2, the driver of the motorvan first.

SD2 who works as a surveyor's assistant had testified as follows:

On 19 October 1998 at about 6.30pm, he was driving his motorvan in the slow lane from Sungai Siput North in the direction of Kuala Lumpur. With him in the motorvan were his wife and his paternal uncle. Upon reaching the 323.3km which was a straight stretch of road at about 7 or 7.30pm he saw ahead of him at a distance of 30m, a vehicle in the emergency lane with its hazard lights switched on as the lights were flashing. He was positive that the vehicle, namely, a motorcar, was wholly within the emergency lane. Suddenly, when his motorvan was five or six metres away from the motorcar a motorcycle collided into the rear right of the motorcar. As a result thereof, the motorcycle fell onto the road. The motorcyclist who was thrown off his motorcycle fell onto the road right into his path.

His attempt to avoid colliding into the motorcyclist by swerving to the right proved unsuccessful. After colliding into the motorcyclist, he went straight to the police station and lodged a police report, D11.

Prior to the first collision, he did not see the motorcycle. This caused him to believe that the motorcycle was being ridden on the left side of the slow lane and not in front of him.

In cross-examination, he disagreed as follows:

The first collision occurred at about 8 or 8.30pm at night. It was dark at that time and that he could not see the motorcycle prior to the collision

because he did not switch on the lights of the motorvan or because he was not keeping a proper lockout. Half of the motorcar was on the slow lane and the other half was on the emergency lane. He was travelling at a speed exceeding 90kmph and that he was unable to avoid colliding into the motorcyclist because he was following the motorcyclist too closely.

In re-examination, he explained that he did not look at the left side of the road because his attention was focused in front of him. He did not know where the motorcycle was shortly before the first collision. He did not switch on the lights of his motorvan because there was still sufficient daylight to enable him to see in front of him.

The second defendant's wife's evidence

I shall now deal with the evidence of SD3.

As expected, the testimony of SD3, the second defendant's wife, supported the evidence of the second defendant and also SD2 in material particulars. According to her, on 19 October 1998, she and her husband, the second defendant, had left Taiping for Kuala Lumpur in the motorcar. When they were approaching Tapah at about 7.30pm the motorcar broke down because of engine problems and the second defendant stopped his car in the emergency lane so as not to obstruct the other road users. They did not intend to leave the motorcar there for the night.

The second defendant then switched on the hazard lights and the headlights. Half an hour later a tow truck passed them, stopped and offered assistance subject to payment. A friend of the tow truck came in another car from the opposite direction and took her and the second defendant to the workshop to await their motorcar. However, before they could get to the workshop, they had to make a U-turn. Upon doing so and upon reaching the spot where they had left the motorcar earlier, she found that there was a traffic jam and that the south bound traffic was moving slowly. She learnt that this came about because a motorcycle had collided into the motorcar.

In cross-examination, she said that the first collision occurred at about 8 or 8.30pm at night. It was dark at the scene of the accident. There was a grass verge in the emergency lane. She disagreed that part of the motorcar was on the emergency lane and the other part was on the slow lane. She also disagreed that the hazard lights were not switched on and that they were not flashing.

Evidence not considered by the learned trial judge

The court observes that the learned trial judge had not considered that amongst the plaintiff, the second defendant and SD2, it was SD2 who lodged his report, D11, first in point of time, ie on 19 October 1998 at 8.13pm. In his report he expressly mentioned that the motorcar was in the emergency lane. The second report to be lodged, D10, was also on the same day, ie 19 October 1998 but half an hour later, ie at 8.41pm by the second defendant. In his report, he expressly mentioned that his car had problems

A and he had parked it in the emergency lane with both the signal lights and the rear lights on. The plaintiff only lodged his report, P3, a good seven months after the accident, ie on 20 May 1999 at 11.35am. In his report, he mentioned that half of the motorcar was on the emergency lane and the other half on the slow lane. He also mentioned that he was following a motor lorry which suddenly turned right into the fast lane. As he was B following too closely behind the motor lorry, he was unable to avoid colliding into the motorcar.

The learned trial judge did not consider that since the second defendant and SD2 had lodged their reports at the earliest available opportunity, the contents of their report were more likely to be true as opposed to the C plaintiff who lodged his report very much later thereby giving rise to the possibility that the contents of his report may not be true and that his report may have been drafted in a manner so as to protect his own interest and conceal what actually occurred since he had ample opportunity to do so. The learned trial judge also did not consider that the plaintiff did not give the registration number of the motor lorry in his police report although in D his oral testimony in court he has mentioned that he was following closely behind the middle of the motor lorry and the lights of his motorcycle were switched on.

The learned trial judge also erred when he did not view the plaintiff's evidence in the light of the other evidence. Had he done so, he would have E found that if what the plaintiff told the trial judge was indeed true about riding his motorcycle closely in the middle behind a small motor lorry, he would not and could not have collided into the motorcar because his reflex action would have caused him to automatically swerve to the right as was done by the motor lorry. If the motor lorry whose body is manifestly very much broader than the motorcycle could have swerved to the right to avoid F the first collision assuming for a moment what the plaintiff said about the existence of the motor lorry was true it is inherently improbable why the plaintiff could not have similarly done so.

The learned trial judge also did not consider whether the glass splinters in the slow lane at 'C' in the sketch plan, P1, could have come about from G the first collision or the second collision. It would appear from his extremely brief grounds of judgment that he had gone on the assumption that all the glass splinters found by the IO at 'C', both in the emergency lane and in the slow lane in the sketch plan, P1, had come from the first collision. He failed to consider the unchallenged evidence of the plaintiff's own witness, SP1, H the IO that quite apart from the damage to the rear right lamp of the motorcar, the headlights of the motorcycle and both the left and right signal lights of the motorcycle were also broken. He also failed to consider whether the glass splinters at 'C' in the sketch plan, P1, which the IO had found on the left side of the slow lane could have been caused by the second collision. His omission to do so amounts to a misdirection in law because of the I unchallenged and undisputed evidence of the plaintiff himself and SD2 that soon after the first collision, the plaintiff fell onto the highway and the second collision followed.

Neither did the learned trial judge explain in his grounds of judgment why he had chosen to disregard completely the oral evidence of the IO, SP1, the driver of the motorvan, SD2, and the second defendant's wife, SD3, which corroborated substantially the oral evidence of the second defendant on four very material matters. The first is that SD2 and SD3 had testified that the lights and hazard lights of the motorcar were switched on and were flashing. SD2 had testified that he could see the hazard lights flashing at a distance of 30m. The second is that the IO had testified that there were tyre marks in the emergency lane and traces of oil on the tyre of the motorcar. The third is the width of the emergency lane excluding the portion which is covered by grass had been measured by the IO, SP1, who is the plaintiff's own witness, and more importantly, an independent witness, is clearly stated in the sketch plan, P1, to be 2.6m or about eight feet wide which is certainly wide enough to contain the whole width of the motorcar without the necessity for the motorcar to encroach into the slow lane. The fourth is the testimony of SD2 and SD3 that the motorcar was wholly within the emergency lane. In my view the failure of the learned trial judge to give reasons as to why he had chosen to disregard the above has caused his decision to be seriously flawed. If he had considered these four very important matters, he would have found that the presence of the glass splinters in the emergency lane at 'C' in the sketch plan, P1, in actual fact corroborates and supports the version of the second defendant. He would, consequently, have ruled that it was more probable that the motorcar was parked wholly within the emergency lane. He would also have concluded that if it was indeed true as alleged by the plaintiff that half of the motorcar was on the slow lane and the other half was on the emergency lane, it would have been inherently improbable for the glass splinters to have been found at 'C' but would be more probable for the glass splinters to have been found nearer to the centre of the slow lane bearing in mind that the slow lane is 3.6m or 11ft and seven inches wide as stated in the sketch plan, P1.

If the learned trial judge had correctly directed himself on the evidence adduced before him, he would also have concluded that it was most probable that the plaintiff was riding his motorcycle either on the white line demarcating the start of the emergency lane or within the emergency lane, something which he should not have done since his right of way is within the slow lane and the fast lane unless, of course, he was experiencing problems with his motorcycle, which fact was not in evidence before the learned trial judge.

There is another matter. This concerns the time of the first collision and whether it was already dark at that time. As mentioned earlier, the learned trial judge had made specific findings of facts concerning this, ie that the first collision occurred at night between 8pm and 8.30pm and that it was already dark when the first collision occurred. Unfortunately, he did not deem it fit to explain why he came to such a conclusion.

It would appear to this court that he had accepted *in toto* the evidence of the second defendant and his wife to that effect without considering the following factors. First, it is clear from the evidence that neither the second

A defendant nor his wife witnessed the first collision. They were also not present at the scene when the first collision happened. They have said that they only learnt of the accident when they happened to be passing by the place where they had earlier on left the motorcar which had broken down.

B There is some contradiction in the second defendant's evidence. In his testimony in court, the second defendant had said that the motorcar broke down between 6pm and 6.30pm. However, in his police report, D10, he said the motorcar broke down at 7.30pm. When cross-examined, he maintained that the motorcar broke down at 7.30pm. What is of crucial importance is that the learned trial judge had failed to consider that in view C of the contradiction in the second defendant's evidence concerning the time the motorcar broke down, he should not have accepted *in toto* the evidence of the second defendant and his wife that the first collision happened at between 8.15–8.30pm since it was only a rough estimate. The learned trial judge did not consider that the second defendant had arrived at this rough estimate by estimating the length of time he took to think about what to do D after the motorcar broke down and also the length of time he took to speak to the tow truck operators about towing his car to the workshop. The second defendant had used the same deductive process to conclude that it was dark at the time of the accident.

The learned trial judge also erred when he did not go further to consider E whether it was inherently improbable for the first collision to have occurred at night between 8.15pm and 8.30pm and that it was already dark at the time of the first collision in view of the following:

First, if the accident had occurred between 8–8.30pm, it would not have been physically possible for SD2 to complete lodging his police report, F D11, by 8.13pm bearing in mind that after the second collision, SD2 would have needed time to go to the Tapah Police Station to lodge his report. He would have also needed some time to tell the police what happened so that the latter could understand it and then take it down in a readable form. The IO was informed of D11 at 8.20pm. The IO arrived at the scene of the accident about half an hour later, ie at 8.51pm.

G Secondly, if the accident had happened between 8–8.30pm, the second defendant would not have been able to complete lodging his police report, D10, at the Tapah Police Station by 8.41pm bearing in mind that upon reaching the scene of the accident, he would have spent some time looking at the damage to the motorcar and the scene of the accident. He then had the motorcar towed to the police station on the order of the PLUS H personnel. Thereafter, he, himself, had gone to the Tapah Police Station to lodge his report. Similarly, like SD2, while at the police station, he would have to spend some time telling his version to the police.

It would appear from SD2's evidence that the first collision occurred at about 7.30pm during twilight time, ie the time between daylight and I darkness, and that at that time he was still able to see in front of him without switching on his lights. There is only one eyewitness to the first collision. He is SD2.

The plaintiff himself said in his police report, P3, that the accident happened at about 8pm which would mean close to 8pm. However, this report was only lodged seven months after the accident. Hence, the learned trial judge should have considered whether lesser weight should be given to this piece of evidence. A

This court is satisfied that had the learned trial judge considered all the evidence and factors as set out above, he would have held that the first collision most probably occurred in the late evening at about 7.30pm instead of at night between 8–8.30pm and that although it was dark at the time of the first collision, there was still a faint light instead of total darkness. B

In view of the foregoing, this court would answer the first issue in the negative. C

Issue 2: Whether the learned judge erred when he failed to consider the ability of the plaintiff to avoid colliding into the motorcar

Even assuming that it was indeed true that the plaintiff was following closely behind the middle of a motor lorry although SD2, the motorvan driver, has testified that he only saw the motorcar and the motorcycle, this court is of the view that the learned trial judge erred when he failed to consider that had the plaintiff kept at a safe distance from the motor lorry and also kept a proper lookout, he could have avoided colliding into the motorcar since there is ample evidence to the effect that both the lights and the hazard lights of the motorcar were switched on and the van driver was able to see the lights 30 meters away. Had the learned trial judge considered this factor, he would have held in favour of the second defendant. D E

This issue must, therefore, be answered in the affirmative.

Issue 3: Whether an extremely high standard of care was placed on the second defendant F

This issue is to be answered in the negative because the learned trial judge did not accept the second defendant's version that he had parked the motorcar wholly within the emergency lane.

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Issue 4: Whether the learned trial judge erred when he drew an adverse inference against the second defendant for failing to call the tow truck operators

Based on the evidence appearing in the appeal record and the principle of law applicable, this issue must be answered in the affirmative. The reason is because the learned trial judge had failed to consider that although the second defendant had testified that he could call the tow truck operators as witnesses, he had also called SD4, the adjuster, to testify that he was instructed by the second defendant's solicitors to investigate and interview the tow truck operators. Despite having made efforts, he ('SD4') was unable to locate the tow truck operators. SD4 had carried out a company search, D14. He had also gone to the premises of the company, Hong Hing Automobile Service Centre Berhad, at its address at Nos 27–28, Jalan Bidor Jaya 1, Bidor on one occasion, and found that although the building and the H I

A signboard were still there, the company had closed down due to the economic downturn. He had made enquiries from the neighbours and managed to obtain two telephone numbers of one of the directors. He had also given details of two of the directors, ie their names and the telephone numbers of one of them. SD4 had contacted one of the company directors, namely, Mr Lai Kuan Loy. Upon contacting him, the latter informed SD4 B to contact his brother, Mr Lai Kuan Lim, another company director, instead. SD4 met Mr Lai Kuan Lim who told him that the company had closed down because of the economic downturn and that the tow truck operators were no longer with the company. Some of them were working part time with other companies but he was unable to furnish to SD4 further information concerning the tow truck operators who were involved in the C accident case. SD4 prepared a report of his findings, D13.

In cross-examination, SD4 had agreed that the company search, D14, showed that although the name of the company had been changed, the identities of the directors remained the same. SD4, however, disagreed that if he had conducted intensive investigations he would have obtained more D information about the tow truck operators. He further explained that the company directors to whom he spoke did not give him their full co-operation and neither did they give him the home addresses of the tow truck operators.

The learned trial judge erred when he did not consider the evidence of E SD4 on this issue. If he had, he would have been satisfied that sufficient attempts were made to locate the tow truck operators. Consequently, he would not have drawn an adverse inference against the second defendant under s 114(g) of the Evidence Act 1950 for not calling the tow truck operators.

F *Issue 5: Whether the apportionment of equal liability between the plaintiff and the second defendant was correct*

On the issue of apportionment, the Supreme Court in the case of *Ahmad Nordin bin Haji Maslan and Anor v Eng Ngak Hua and Ors* [1985] 2 MLJ 431, at p 434, held as follows:

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> The next point relates to the apportionment of liability. As stated earlier, the Judge held that both were equally to blame for the accident and apportioned it to 50–50. It is not appropriate in our view to use reported cases as guidelines since there is no fixed formula on which apportionment can be worked on. All depends on the discretion of the trial judge and has to be considered in the light of the facts and circumstances of a particular case. It is therefore a H question of fact.

Mr Gurmit Singh, the learned counsel for the second defendant, has submitted that the second defendant should not be held liable at all because he had parked the motorcar wholly within the emergency lane and had switched on both the lights and the hazard lights. In support thereof, he I relied on the decision of the majority in the Federal Court case of *Chan Loo Khee v Lai Siew San & Ors* [1971] 1 MLJ 253 where Gill FJ had held that he had not been able to find a single decided case where the owner or driver

of a vehicle leaving it on a highway with its lights on has been held liable in negligence.

In response, Mr Sarjeet Singh, the learned counsel for the plaintiff, relied on the Privy Council case of *Chop Seng Heng v Thevannasan & Ors* [1975] 2 MLJ 3 where all the five Law Lords had respectfully and emphatically approved the following statement of general principle enunciated by Ong CJ in his dissenting judgment in that case at pp 254 and 255:

> If parking a car, however recklessly, so as to cause needless obstruction to other road users, were to be held blameless, merely because other motorists could still have room to pass, *provided they kept a proper look-out*, then it would appear that the deliberate parking of a car anywhere, even in the middle of the highway, should be considered equally excusable, if not justifiable, regardless of the fact that, by reason of such obstruction, other motorists had come to grief by reason of their not being fully alert. In such cases there should, in my opinion, be proper apportionment of blame depending on the circumstances. But, to exonerate the obstructionist completely — when it is undeniable that, but for the presence of the obstruction there could not possibly have been an accident — is to ignore the principle of placing the blame fairly on those to be blamed for their acts or omissions. In this age of fast motor transport I think it is the duty of the courts to eschew excessive legalism and to require that every motorist should observe the golden rule of shewing due consideration for other road-users, or suffer the consequences of his failure to do so.

In the final analysis, there being no misdirection nor error in principle by the trial judge, Lord Edmund Davies who delivered the judgment of the board restored the 75%–25% apportionment arrived at by the trial judge, Suffian FJ in the high court. It is noteworthy that Ong CJ in his dissenting judgment in *Chan Loo Khee* had gone on to hold the drivers of the Opel and Fiat 80% and 20% responsible for the unfortunate accident.

In the appeal before this court, the second defendant himself testified that after the accident the motorcar was towed to the police station upon the order of the PLUS personnel before the police arrived at the scene. As a result of this, no record of the motorcar was made by the IO in his sketch plan, P1. The question that arises is why would the PLUS personnel order the motorcar to be towed to the police station if it was not causing obstruction to other road users, in particular, motorcyclists as it is a common experience that motorcyclists do use the emergency lane or ride along the white line demarcating where the slow lane ends and where the emergency lane begins in order to keep out of the way of bigger vehicles using the slow lane such as cars, buses and lorries travelling at a fast speed. In fact, when the plaintiff was cross-examined by the second defendant's counsel in the court below, it was put to him that he was riding along the emergency lane or along the white line.

On the question of law, I am of the view that the following dicta of Lord Uthwatt in *London Passenger Transport Board v Upson* [1949] AC 155, at p 173, is applicable here as the surrounding circumstances of this appeal plainly justify their application:

> A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take.

Since it was reasonably foreseeable that motorcyclists may use the emergency lane or ride on the white line, the second defendant should have parked the motorcar further inside the emergency lane as the whole width of the emergency lane was 3.2m or ten feet four inches including the grass verge whereas the standard width of a car is only about six feet, or have a warning sign placed behind the motorcar to alert the motor cyclists.

With respect to Mr Gurmit Singh, the learned counsel for the second respondent, I did not find the cases of *Abdul Mokhti bin Haji Ahmad v Idris bin Ibrahim* [1977] 2 MLJ 85, *De Cotta v Tan Hock Lee* [1972] 2 MLJ 173 and *Parkinson v Liverpool Corpn* [1950] 1 All ER 367 relevant nor applicable because they concern the duty of a driver following a leading car which was to drive in such a fashion so as to avoid accidents arising out of exigencies of the leading car since the facts of the present appeal show that when the plaintiff collided into the rear right of the motorcar, the motorcar was not moving and was merely left stationary on the emergency lane of the highway.

Similarly, the case of *Siow Choo Foo v Lee Peng Lay & Anor* [1981] 2 MLJ 336, where the first defendant was held two thirds to blame for leaving his stationary lorry on the road on a dark night with its tail lights off and the plaintiff one third to blame for not slowing down on being blinded by the glare of the head lights of an oncoming vehicle, is to be distinguished from the instant appeal before this court because unlike the facts here, the lorry in that case was not left on the emergency lane of a highway.

On the principle of law applicable, Suffian LP in *Samar binte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71 had this to say (at p 71):

> The learned trial judge was concerned to determine who was telling the truth, but we sitting in an appellate court are concerned to determine not so much the truth as whether there had been an error on the part of the trial judge. The issue is a simple one — was the learned trial judge in error in concluding the defendant was not negligent?

The learned trial judge held that the plaintiff's version was more probable. Yet, he apportioned liability at 50/50 on the ground that the second defendant had not parked his car wholly within the emergency lane and that the second defendant had not placed a warning sign behind his car to warn other vehicles of the presence of the motorcar on that part of the road.

The case of *Zainap bte Abd Majid & Ors v Gan Eng Hwa & Ors* [1995] 1 MLJ 801 where Richard Talalla J had apportioned liability between the driver and owner of a lorry and the driver of a motorcar at 50/50 is distinguishable on facts. In that case, the lorry was parked on the Muar-Batu Pahat main road facing the wrong way thereby causing obstruction and danger to other road users such that the driver of the motorcar, in which the plaintiff's were passengers, driven by one Encik Taib in attempting to avoid colliding into a Mercedes in front of him collided with an on coming express bus.

The learned judge had held that the lorry was parked on the road needlessly and selfishly and in such a way as to cause obstruction and danger to other road users. In the instant appeal, there is evidence that the motorcar which was driven by the second defendant developed engine trouble causing the motorcar to break down and there was spillage of oil on the road. Hence, the act of the second defendant in parking the motorcar in the emergency lane was justified and clearly not needless nor selfish. However, in parking the motorcar in the emergency lane, he omitted to ensure that the motorcar was parked sufficiently inside the emergency lane so as not to cause obstruction to motor cyclists who may use the emergency lane. Having parked the motorcar close to the white line demarcating the beginning of the emergency lane, he should have placed a warning sign behind the motorcar. In failing to do this, he had contributed to the accident by not exercising the proper standard of care required of a prudent motorist in the prevailing circumstances.

In the ultimate analysis, upon a full evaluation of the evidence as disclosed in the appeal record and the grounds of judgment of the learned trial judge, I am satisfied that the learned trial judge had erred when he did not draw the proper inferences from the proven facts. I am also satisfied that if the learned trial judge had not fallen into that error, he would have held that the evidence of the plaintiff with regard to the accident was inherently improbable (see *Mohd Salleh bin Samad v Zainodin bin Dongking* [2001] MLJU 623, *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and Another Appeal* [1996] 2 MLJ 517).

The learned trial judge would also have found the second defendant's version that he had parked the motorcar on the emergency lane as a result of engine trouble as evidenced by the spot of oil on the road, the tyre marks and the oil stains on the tyre of the motorcar, inherently probable. Having done so, the learned trial judge would then have gone on to consider whether the second defendant had contributed to the accident by parking his car too close to the white line demarcating the start of the emergency lane and the end of the slow lane without placing a warning sign at a reasonable distance behind the motorcar. If he had done this, he would have concluded that the second defendant should either have parked the motorcar further inside the emergency lane since there was the undisputed evidence of a grass verge which was 0.6m wide within the emergency lane or place a warning sign behind the car. For this act of contributory negligence, the learned trial judge would have held that the second defendant is 25% liable to the plaintiff for the injuries, disabilities, pain and suffering and loss suffered by the plaintiff as a result of the accident.

Therefore, the last and final issue must be answered in the negative.

In the premises, the court allowed the second defendant's appeal on the issue of liability. The order of the learned trial judge on apportionment of equal liability between the plaintiff and the second defendant is unjustified and is set aside. Liability is apportioned between the plaintiff and the second defendant at 75%/25%. The second defendant having withdrawn his appeal

against the decision of the learned trial judge on the issue of quantum, this court strikes out the appeal of the second defendant on the issue of quantum and awards half costs of the appeal to the second defendant.

Second defendant's appeal on the issue of liability allowed.

Reported by Lim Lee Na